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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-552

LOUIS B. SCHWARTZ and BERNARD L. SEGAL,

Petitioners,

—v.—

DEFENDER ASSOCIATION OF PHILADELPHIA,

Respondent.

(In re Amendments of Articles of Incorporation of Defender Association)

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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(In re Amendments of Articles of Incorporation of Defender Association)

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

The petitioners, Louis B. Schwartz and Bernard L. Segal, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Pennsylvania entered in this proceeding on July 2, 1973.

Opinions Below

The judgment and opinion of the Supreme Court of Pennsylvania, together with the dissenting opinion, are reported in 307 A.2d 906, and appear in the Appendix, *infra*, pp. 1a-35a. The per curiam judgment and dissenting opinion in the Superior Court of Pennsylvania are reported in 219 Pa. Super. Ct. 309, 279 A.2d 240 (1971), and are set forth in

the Appendix, *infra*, pp. 36a-53a. The Adjudication of the Court of Common Pleas of Philadelphia is set forth in the Appendix, *infra*, pp. 54a-72a.

Jurisdiction

This Court's jurisdiction is invoked under 28 U.S.C. §1257(3). The judgment of the Supreme Court of Pennsylvania having been entered on July 2, 1973, this petition for certiorari was filed within 90 days of that date.

Questions Presented

1. Are the federal constitutional rights of indigent accused, under the Sixth and Fourteenth Amendments, abridged by a reorganization of an independent public defender organization so as to vest 50% control of its board of directors in the executive and prosecuting authorities?

2. May the constitutionally mandated defense of the indigent be entrusted to an agency dominated by law enforcement officials?

3. In passing on the constitutional validity of such an arrangement, is the test whether the arrangement has a manifest and substantial potential for impairing the independence of public defenders, or is it whether actual prejudice can be demonstrated?

Constitutional Provisions Involved

The Sixth Amendment to the Constitution of the United States:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the Constitution of the United States:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case

This case poses the question of the legality, under the Sixth and Fourteenth Amendments to the federal Constitution, of Philadelphia's newly reorganized system of providing defense counsel to indigent accused. The facts, for the most part recited in the opinions below, are essentially undisputed. Prior to 1969, counsel for the indigent had for 35 years been provided by the Philadelphia Defender Association, a private non-profit association governed by a board of 50 lawyers and leading citizens of diverse backgrounds annually elected by the membership. The income of the association consisted of membership dues and charitable contributions including substantial allocations by the United Fund. Following expansion of the right to counsel

in *Gideon* v. *Wainwright,* 372 U.S. 335 (1963), and its progeny, it became necessary to enlarge the comparatively small staff of lawyers and auxiliary personnel of the Defender Association. The Ford Foundation provided supplementary support for a limited period, and the City of Philadelphia began to appropriate substantial amounts annually through the budget allocation for the courts. The Defender Association also represents 75% of all federal defendants in the Eastern District of Pennsylvania, having been designated as a "Community Defender Office" under the Criminal Justice Act of 1964, as amended, 18 U.S.C.A. §3006A (1973 Supp.).[1]

In 1968, when it appeared that the budget of the Defender Association would be upwards of $1,000,000, there was introduced in Philadelphia's City Council a bill to replace the independent Defender Association with a Public Defender whose staff would be appointed by the Mayor (Tr. 70-71, 74-76, 78-79).[2] The Defender Association and other organizations representing the black community and the poor opposed the ordinance on the ground that "the Mayor who . . . appoints the Police Commissioner would also be appointing the Public Defender" (Tr. 587, 259). Negotiations ensued between the City administration and the Defender Association, resulting in a "compromise." In exchange for continuing financial support, the Defender Association acceded to the City's demand for the dismissal of the incumbent Chief Defender, whose professional competence was not questioned but who was politically unacceptable to the

[1] See 38th Annual Report of the Defender Association of Philadelphia (1972) p. 1.

[2] "Tr." refers to the transcript of the proceedings in the Court of Common Pleas of Philadelphia.

Mayor (Tr. 253ff, 337ff). The Association dropped its demand that any new Chief Defender should have tenure subject to dismissal for good cause only (Tr. 104ff, 225ff), and agreed to reorganize the Board of Directors so as to share control with the Mayor. The reorganized Board would consist of 30 instead of 50 members. Ten would be designated by the Mayor; ten would be designated by the Defender Association; and these 20 would designate the last ten.

A number of members and directors of the Defender Association, including petitioners, opposed this so-called compromise on the ground that it would create an unconstitutional "partnership" between the independent Association and the executive and prosecuting authorities in City Hall. The Defender Association approved the agreement by a vote of 19 to 16. In accordance with the Pennsylvania Non-Profit Corporation Law, the Association then petitioned the Court of Common Pleas of Philadelphia for approval of the necessary amendment of its charter. Petitioners and others appeared as objectors. In the course of the four-day hearing, there was testimony as to the course of the negotiations referred to above, as to the likelihood of prosecution influence on the defender operation (Tr. 321-2, 367, 473, 609-610); as to the problems of "command influence" in courts martial (Tr. 370ff) and in state-controlled defense as in the Soviet Union (Tr. 526ff); as to the federal constitutional right to independent defense counsel (Tr. 461ff); as to the "appearance of evil" in City control of the defense, undermining the confidence of blacks and other poor defendants (Tr. 398, 412, 525-6, 556); and as to the absence of any legitimate concern of the City that would call for 50% control of the Board of Directors (Tr. 216, 227ff, 240-1, 611).

The trial court, rejecting the federal constitutional arguments advanced in briefs by the objectors and the American Civil Liberties Union and through expert testimony (Tr. 459ff), held that the proposed reorganization of the Defender Association was "lawful", as well as "beneficial" and "not injurious to the community."[3] The Superior Court of Pennsylvania affirmed *per curiam,* two judges dissenting. The Supreme Court of Pennsylvania, with two justices dissenting, affirmed the Superior Court. It held that there is no conflict of interest "in the fact that the Mayor appoints both the Commissioner of Police and the City Solicitor, a prosecuting official, whose interests as law enforcement officers are presumed [by the objectors] to be antithetical to those of criminal defendants," and that the reorganized structure of the Defender Association "provides adequate safeguards to protect its independence." Mr. Justice Roberts, dissenting, reviewed the decisions of the Supreme Court of the United States requiring defense counsel of undivided loyalty, and declared that "the amendments approved by the majority will undoubtedly destroy the necessary independence and non-political character of the Association." The dissenting opinion also emphasized the "equally objectionable appearance of . . . conflict" in the Association's sharing of control with the executive and prosecuting officers of the City, citing *Tumey* v. *Ohio,* 273 U.S. 510, 533 (1927) ("Might not a defendant with reason say that he feared he could not get a fair trial?"). Mr. Justice Roberts' dissent also demonstrated the concrete reality

[3] Conclusions of Law Nos. 3 and 4 of the Adjudication of the Court of Common Pleas dated Aug. 8, 1969. The quoted phrases are the criteria prescribed in the Pennsylvania Non-Profit Corporation Law, 15 Pa. Stat. Ann. §7707 (Purd. 1967), for judicial approval of amendments of charters of non-profit corporations.

of the City authorities' disposition to put pressure on the defender organization, in the following summary taken from footnote 4 of his opinion (App., *infra*, pp. 26a-27a):

> The record also discloses that on June 10, 1969 (at this time, the Defender Association was being primarily privately funded, in substantial part, by the United Fund) the Philadelphia Bulletin reported (on page 1) Police Commissioner (now Mayor) Rizzo's statement that he intended to stop police payroll deductions for the United Fund, since the United Fund also supported the Legal Aid Society. Commissioner Rizzo emphatically stated that organizations that "fight the Police Department . . . won't get a penny." The Philadelphia Bar Association, on June 16, 1969, roundly deplored, by resolution, the Commissioner's threat.[4]

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[4] The Resolution referred to reads as follows:

"WHEREAS, the Philadelphia Commissioner of Police has publicly charged the Legal Aid Society of Philadelphia with harassing ithe police force and processing complaints against police officers, a charge which investigation indicates to be unfounded in fact, and

WHEREAS, the Board of Governors deems such charge an attack upon the freedom of the lawyer to represent his client.

NOW, THEREFORE, BE IT RESOLVED, That the Philadelphia Bar Association through its elected Board of Governors supports and encourages every lawyer in the exercise of his professional responsibility to represent any client or group of clients in regard to any just cause of action no matter how unpopular; and,

FURTHER RESOLVED, That the Philadelphia Bar Association deplores any action or statement by any government official who attempts to discourage or interfere with the operation or activities of a non-profit corporation providing legal services to the community merely because the lawyers employed thereby, acting in good faith and within the confines of ethical conduct, zealously represent their clients in matters deemed embarrassing to, or which involve claims against, a government entity or individuals employed thereby."

The Philadelphia Bulletin on August 27, 1969 (page 42) and on August 29, 1969 (page 1) under the headline "Rizzo Sets Up Meeting With Judge Carroll", reported a meeting, in Mayor Rizzo's office, attended by the District Attorney, the Commissioner of Police, the Mayor and several judges (including President Judge Carroll), at which the judges were pressed to change their "lenient" sentencing policies. (These events, although included in the opponents' brief, are not of record as they transpired after the hearing in the trial court.)

The above events can hardly be viewed by the community and indigent defendants as an assurance that the City will in no way attempt to influence the criminal defense of those unable to retain private counsel.

REASONS FOR GRANTING THE WRIT

I.

This case presents a constitutional issue of exceptional public importance: minimum safeguards of independence of counsel in public defender organizations.

This is the first case to reach the Supreme Court on the subject of the constitutional requirement of independence of tax-supported counsel for the poor. It comes at a moment in history when the institutional forms for defender organizations are in the process of being established for generations to come.[5] If the decision below, accepting the

[5] See Senator Ervin's speech on S. 1461, amending the Criminal Justice Act of 1964 to provide for organized defense of the indigent in federal courts:

> For many years doubts and discomfort accompanied the idea of a government defense function. It was thought that this

"partnership" of law enforcement authorities in the defense of the poor, is allowed to stand, this will not merely permit an isolated case of injustice to go without remedy; it will leave uncorrected a false buoy in the channel of development of defender organizations. There will be many to act on the signal, to grasp the opportunity to politicize the defense of the indigent, to control it so as to give police and prosecutors a freer hand, or merely to dilute the efficacy of the defender organizations by making "spoils system" appointments of third-rate attorneys to the staff. This case evokes no anguishing borderline principle; it calls for an authoritative vindication of the clear constitutional rule that representation by a public defender may not be compromised through organizational links with the prosecuting authorities—may not, in a word, be second class.

The present case is particularly compelling as a vehicle for declaring the constitutional law on the subject because a decision here will be prospective in its operation. That avoids the troublesome problem of wholesale retroactivity which will arise if the structure of public defenders is invalidated through habeas corpus brought by convicts.

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would create a conflict of interest. For some, it would interfere with the Government's main responsibility to prosecute. For others, it was feared the defense function would be subordinate to prosecution-minded Government. After much thought and consideration over the past 6 years, these doubts have been put to rest. The language in S. 1461 which authorizes Government defender offices is specially designed to insure that those who defend an accused will perform the responsibilities no less conscientiously than those who prosecute. The defender organizations are meant to be independent from the Justice Department and, no less important, from the judiciary in all but minor administrative matters.

116 Cong. Rec. 35499 (1970).

II.

The constitutional right to the assistance of counsel is violated by any system of providing defense to the indigent which is dominated by law enforcement authorities.

A. *The Reorganized Defender Association Is So Dominated.*

1. There Is 50% Control *De Jure* and Overwhelming Control *De Facto*.

On its face, 50% of the power in the reorganized Board of Directors is in the hands of the Mayor of Philadelphia, who appoints the Commissioner of Police and the City Solicitor, a prosecuting officer. The Mayor is also, of course, responsible for the maintenance of order in the City,[6] and for the execution of its laws. But the actuality of power is far greater than the nominal 50%. The increment of power above 50% derives from the expectable bloc voting of the Mayor's non-tenured appointees, particularly in the election of the "neutral" directors, on the budget of the Defender, and on any other issue that concerns the Mayor.

The existence of control and the inclination to use it are clear. The Mayor was able to make it a condition of the deal that the incumbent Chief Defender, a political opponent, be dismissed, and that future Chief Defenders should not enjoy a protected tenure but should be dismissable without cause. The bold proclivity of the Philadelphia executive and law enforcement authorities to put pressure on the Defender and even the judges is revealed in the dissenting opinion below. See Statement of the Case, pp. 7-8 above.

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[6] See *Stotland* v. *Pennsylvania*, 214 Pa. Super. 35, 251 A.2d 701 (1969), *app. dism.* 398 U.S. 916, Mr. Justice Douglas dissenting (Philadelphia Mayor's emergency proclamation banning public gatherings).

2. Whatever the Degree of City Hall Control, It Is Excessive If It Is Greater Than Serves Any Legitimate Interest of the City; an "Impermissible Degree of Entanglement" in the Legal Defense of the Indigent Arises.

The unique structure of the reorganized Board of Directors is stamped on its face as an impermissible sharing of power with interests antagonistic to the defense. The tripartite arrangement, under which enforcement authorities designate 10 directors, defense interests designate 10 directors, and these 20 designate 10 more "neutral" directors, is plainly derived from commercial and labor arbitration.[7] Whatever may be the merits of such a structure for an unofficial tribunal on which representatives of each party to a private controversy may, pursuant to prior agreement, sit alongside "neutral" members, it is unthinkable that defense of the indigent be so organized. Legal defense is not arbitration. It is not intended to work out practical compromises or alliances between commercial interests. It is not intended to be "neutral." It calls for unequivocal commitment to the interests of the accused. Even in the military service, where of necessity the ordinary liberties of a citizen are restricted, "command influence" in the structure of courts martial has been abjured.[8] The mere fact

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[7] Cf. *Commonwealth Coatings Corp.* v. *Continental Casualty Co.*, 393 U.S. 145 (1968).

[8] See Article 37 of the Uniform Code of Military Justice; *United States* v. *Berry*, CM 414955, June 7, 1968, digested in Judge Advocate Legal Service, Pamphlet 27-68-18, page 4 ("Appearance of Command Influence Raises Rebuttable Presumption" of unlawful command influence despite finding of lack of prejudice); *United States* v. *McLaughlin*, digested in JALS Pamphlet 27-69-1, p. 4, Dec. 13 (1968) (routine command memo assigning three out of a panel of 12 duly assigned officers, for purposes of allocating trial duties, held unlawful command influence); Hansen, *Judicial Functions for the Commander?* 41 Mil. L. Rev. 1 (1968). Cf. *O'Callaghan* v. *Parker*, 395 U.S. 258, 263 (1969).

that government funds are appropriated does not legitimate every restriction the government might seek to impose on the grantee. In the field of welfare legislation, for example, payments to the poor cannot, consistently with constitutional guarantees of liberty, be accompanied by official intrusions on privacy or burdensome constraints.[9]

The only legitimate official interest in the conduct of publicly financed defense is that the funds be honestly and efficiently employed. Not one witness suggested that protection of that interest required the power position that City Hall successfully demanded here. The independent Defender Association had for more than 30 years been conducted "in a gold fish bowl" with a standing invitation to interested public officials to attend directors' meetings. Audits had been carried out in connection with grants from the City and the United Fund. In these circumstances, it was incumbent on the courts below to insist that City Hall power over the defense be circumscribed, to be sure that the principle of "the least restrictive alternative" be applied.[10] The City of New York, which wholly finances defense of the indigent, has no "representatives" on the directorate of the Legal Aid Society (Tr. 501).

In any event, the partnership of law enforcement and defense, sanctioned by the court below, involves an "imper-

[9] Cf. *Shapiro* v. *Thompson*, 394 U.S. 618, 634 (1969) (invalidating one year residence requirement for welfare recipients as unreasonable restriction on movement); *Sherbert* v. *Verner*, 374 U.S. 398 (1963) (disqualification of Seventh Day Adventist for unemployment benefits because of refusal to accept work on Saturday infringes First and Fourteenth Amendments). See generally Note, *Another Look At Unconstitutional Conditions*, 117 U. Pa. L. Rev. 144 (1969).

[10] Cf. Struve, The Less-Restrictive-Alternative Principle and Economic Due Process, 80 Harv. L. Rev. 1463 (1967).

missible degree of entanglement" by officialdom with the lawyer-client relationships of the poor.[11]

B. *The Sixth and Fourteenth Amendments to the Federal Constitution Forbid "Partnership" Between Prosecuting Authorities and Counsel for the Indigent Accused.*

1. Such a Partnership Violates the Due Process Clause of the Fourteenth Amendment.

The constitutional right of poor people to independent, fully effective counsel through every critical stage of any substantial criminal prosecution is today unchallenged.[12] The right "to enjoy the assistance of counsel" has been incorporated into the Fourteenth Amendment as an obligation upon the States, and it has been interpreted to require the state not only to permit counsel but to provide counsel otherwise unavailable to the accused. The reasons why the right to counsel has been generously construed and firmly woven into the fabric of our national life are worth examining since they expose the constitutional deficiency of Philadelphia's proffer of legal assistance.

In the first place the right to counsel rests on the idea of fundamental fairness implicit in the phrase "due process of law." Enormous resources are, in modern society, allocated to a professional police force and professional prosecutors. It would be grossly unfair to the poor and ignorant to leave them to their own resources in confronting the

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[11] Cf. *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971).

[12] *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); *Douglas* v. *California*, 372 U.S. 353 (1963); *In re Gault*, 387 U.S. 1 (1967); *Mempa* v. *Rhay*, 389 U.S. 128 (1967); *Coleman* v. *Alabama*, 399 U.S. 1 (1970); *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972). Cf. *United States* v. *Wade*, 388 U.S. 218 (1967); *Gilbert* v. *California*, 388 U.S. 263 (1967); *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

Leviathan state.[13] Moreover—and this is the core of the lesson of *Gideon* and its progeny—this inequality cannot be remedied by offering partial substitutes. It was well understood before *Gideon,* that a prosecutor was under a special professional obligation not to overreach an uncounseled defendant, and that the judge was under a special obligation to protect the interests of such a defendant. In *Anders* v. *California,* 386 U.S. 738 (1967), where appointed defense counsel filed a "no merit" letter and withdrew from his client's appeal, this Court insisted upon advocacy fully committed to the client, notwithstanding that there was no suggestion of incompetence or bad faith, and notwithstanding that the California judges had laid upon themselves the duty to review the transcript and independently confirm that counsel's "no merit" letter was correct. Cf. *Douglas* v. *California,* 372 U.S. 353 (1963) (counsel on appeal required despite judicial determination that it would not be "helpful"). Thus neither the assumed professional reliability of lawyers nor the obligation of judges to prevent prejudice arising from lawyers' shortcomings saves a conviction where counsel was not unequivocally the advocate for his client.

In holding inadequate these substitutes for a lawyer unequivocally dedicated to the defense, this Court was simply responding to realities: the judge and the prosecutor, bound by other and conflicting obligations to the community, cannot give the defendant what he is entitled to expect from his own lawyer—for the reason, if no other, that the accused could not possibly confide in these representatives of the community which seeks to punish him. The reasoning is entirely applicable to the present case,

[13] *Johnson* v. *Zerbst,* 304 U.S. 458, 462-3 (1938).

where the Philadelphia plan puts the indigent accused into the hands of a "partnership" comprising law enforcement authorities and independent directors.

As Mr. Chief Justice Burger pointed out in his concurring opinion in *Argersinger* v. *Hamlin*, 407 U.S. 25, 44 (1972), "The right to counsel has historically been an evolving concept . . . Part of this evolution has been expressed in the policy prescriptions of the legal profession itself. . . ." It is therefore appropriate to consider, as was done in *Argersinger*, the American Bar Association's Standards Relating to Providing Defense Services (1968). Standard 1.4 is entitled "Professional Independence," and provides, in part:

> The plan should be designed to guarantee the integrity of the relationship between lawyer and client. The plan and the lawyers serving under it should be free from political influence. . . .

Standard 3.1 deals with "Career Service," and provides, in part:

> Selection of the chief defender and staff should be made on the basis of merit and should be free from political, racial, religious, ethnic and other considerations extraneous to professional competence. The tenure of the defender and his staff should be protected similarly.

The Handbook on How to Organize a Defender Office (1967) of the National Legal Aid and Defender Association calls for a governing board which "provides a screen between the defender and 'City Hall' ", appointment of the defender by "an independent board" rather than elected

officials, and tenure for the defender subject to removal only for good cause. Handbook, p. 31.

The least that would be required of a prosecution-linked defender organization, from the point of view of professional ethics and constitutional law, would be full disclosure to each client of the conflict of interest in City Hall's partnership in the Defender Association. This is clear even in civil cases. The American Bar Association's Code of Professional Responsibility (Special Committee on Evaluation of Ethical Standards, 1969), speaking of "potentially differing interests" of multiple clients (Paras. EC 5-14 et seq.), warns against "diluted" or "divided" loyalty, states that "all doubts" should be resolved against representation of potentially conflicting interests, and insists upon the client's being given *"opportunity to evaluate his need for representation free of any potential conflict and to obtain other counsel if he so desires"* (EC 5-16). The lawyer is required to explain the "implications" of common representation before securing his client's consent, and to advise the client of "other circumstances" that might cause the client "to question the undivided loyalty of the lawyer." "Regardless of the belief of a lawyer that he may properly represent multiple clients, he must defer to a client who holds the contrary belief and withdraw from representation of that client" (EC 5-19).

Speaking of the effect on lawyers' independence of "desires of third persons" (EC 5-21 et seq.), the Committee says:

> A lawyer subjected to outside pressures ["often subtle, and a lawyer must be alert to their existence"] should make full disclosure of them to his client.

The Committee notes the special liability to political, economic, and social pressures of the lawyer who is being paid by someone other than his client. What is so emphasized in civil cases must *a fortiori* be true in criminal defense, where effective assistance of counsel is a fundamental constitutional right.

It is obviously unwise and impractical to operate a defender organization on the basis of disclosures to and waiver by often ignorant prisoners with no effective alternatives (Tr. 491-3). It would take far too much time; the process would degenerate into an ineffectual formality of giving prisoners written explanations and waiver forms; much suspicion would be generated by the very process of seeking to allay it; and numerous convictions would be opened to collateral attack.

2. Equal Protection of the Laws Is Denied Where Defense Counsel for the Poor Is Subject to Control by Prosecuting Authorities.

A second basis of the right-to-counsel cases is the Fourteenth Amendment's concern for the "equal protection of the laws." Here, the point is not equalization of legal skills on both sides of the adversary process, but rather a decent attempt to equalize the situation of the rich and the poor before the law.[14] Our society finds it unacceptable that legal procedures themselves should favor the rich, that wealth can assure itself exceptional safeguards in the operation of the law. Such a special safeguard would exist if defense lawyers were available only to those who could afford them. Such a special safeguard would exist if the rich could hire lawyers unequivocally independent and

[14] *Griffin* v. *Illinois*, 351 U.S. 12 (1956); *Douglas* v. *California*, 372 U.S. 353 (1963).

zealous while the poor were obliged to accept lawyers in a partnership dominated by law enforcement authorities. There are obvious practical limits to equalization of legal skills so long as the rich can engage "the best" lawyers and back them up with hired accountants, psychiatrists, and other experts. But surely the constitution forbids the officially institutionalized inequality involved in a public defender organization that gives the law enforcement authorities a large share of control over defense policies and personnel.

3. Actual Prejudice Need Not Be Shown Where Defense Counsel's Independence Is Impugned. It Is the Possibility Not the Actuality of Prejudice That Is Determinative.

A third reason why this Court came to declare an absolute constitutional right to counsel, in place of the old practice of reversing convictions of the undefended only upon a showing that lack of counsel "prejudiced" the defendant, was the practical impossibility of knowing whether there had been such prejudice.[15] Professional ethics or the possibility of reversal of conviction might restrain a prosecutor from overreaching an uncounseled defendant in any way that would be reflected in the transcript. The judge's solicitude might save an uncounseled defendant from obviously hurting his own interests. But such constraints are totally ineffective to prevent the most grievous prejudice of all: failure of the defense to prepare the case effectively, to assure the presence of witnesses whose value to the accused might not even be apparent to him, to investigate the legality of searches and seizures or the possibility of

[15] See Tr. 464 et seq.; Mr. Justice Black, dissenting, in *Betts* v. *Brady*, 316 U.S. 455, 476 (1942); Beaney, The Right to Counsel in American Courts, 163, 185, 234-235 (1955).

illegal wire-tapping, to explore the possibility of negotiating with the prosecution for a plea to a lesser offense. It is precisely this potential for hidden prejudice that is most striking in the Defender Association "partnership" with law enforcement authorities. The Mayor of Philadelphia is the chief executive, responsible for execution of law in the city, for maintaining order in the community, for the appointment and policies of the Police Commissioner and the City Solicitor, for the conduct of the city's fiscal affairs.

The leading Supreme Court case on the necessity for undivided loyalty of counsel to his accused client without inquiry into actual prejudice, is *Glasser* v. *United States,* 315 U.S. 60 (1942). There the Supreme Court reversed a conspiracy conviction on the ground that the trial judge had appointed defendant's lawyer to represent also a co-defendant where there was a potential conflict of interest between the two clients. Conviction was reversed notwithstanding substantial basis for finding that defendant (a former assistant U.S. Attorney) and his lawyer had waived objections to the appointment. The Court's opinion declared (at pages 75-76):

> "To determine the precise degree of prejudice sustained by Glasser . . . is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

Cf. *Tumey* v. *Ohio,* 273 U.S. 510, 532 (1927) ("every procedure which would offer a possible temptation to the average man"); *Commonwealth Coatings Corp.* v. *Continental Casualty Co.,* 393 U.S. 145 (1968) (required disclosure by arbitrator of any business dealings "that might

create an impression of possible bias"); *Lemon* v. *Kurtzman,* 403 U.S. 602, 619 ("potential" for impermissible fostering of religion bars state subsidy even on assumption that teachers would successfully segregate religious and secular responsibilities).

The unequivocal loyalty of defense counsel is at least as important as the impartiality [and immaculate appearance thereof] of the judicial officers involved in the *Tumey* and *Commonwealth Coatings* cases. *Johnson* v. *Zerbst,* 304 U.S. 458 (1938), the landmark case establishing that lack of counsel renders a conviction subject to collateral attack, treated absence of counsel as "failure to complete the court" resulting in loss of jurisdiction. An accused needs a lawyer whom he can trust absolutely even more than he needs a completely impartial judge. Confidentiality is a feature of the client-attorney relationship; it is not so of the judge-defendant relationship. The zealous defense lawyer can often manage to avoid subjecting his client to trial before an unsympathetic judge, be watchful against expressions of bias from the bench, and seek remedies by appeal.

The court below erred in conceiving the issue to be whether "a potential 50% degree of control . . . by the City serve[s] automatically to deprive the indigent client of competent, disinterested counsel" and whether the Defender Association would "be able to render" adequate service. The protestants have never contended that the City-Hall-Public-Defender partnership "automatically" deprives clients of zealous, independent counsel in every case or renders such an organization incapable in every case of supplying satisfactory legal services. A defender organization wholly subject to the Mayor, the Chief of Police, or the district attorney might, if the particular incumbent

officials were extremely high-minded, furnish exemplary legal services. So also it is conceivable that, under a system where judges were designated by and held office at the pleasure of a committee dominated by law enforcement officials, some brave and unbiased judges might nevertheless be found on the bench. Even if the dominating political and prosecutorial group were determined to subvert the defense of poor accused, there would always be individual attorneys on the staff of the Defender who might defy the pressures upon them and honor their professional oaths of loyalty to the client. But what client would be sure? And by what constitutional right do we impose upon poor defendants a lawyer whose unqualified zeal under political pressure must be accepted on blind faith, when a person with means would never take such a risk?

The question at issue is not whether the reorganized Defender Association might be *able* to render acceptable disinterested service in some cases—perhaps the "routine" cases and perhaps so long as community vigilance is maintained[16]—but whether it is so organized as to minimize or eliminate doubts on this score by the clients and the community, i.e. to assure confidence in the integrity of the administration of justice. There was testimony in the record that even the old independent Defender Association was not entirely trusted by its client population, who may have sensed inevitable subtle links between such an "establishment" organization and the political powers that be (Tr. 398, 412, 525-6, 556). Cf. Mr. Justice (then Judge) Burger, in Proceedings of the National Defender Conference (1969) at p. 45:

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[16] Cf. the trial court's reliance on community "watch dogs" to keep the reorganized Defender Association free of "undue" political influence. Finding 20.

> "... [T]he court appointed counsel is, in effect, thrust upon a defendant who has nothing to say about his selection; therefore the tendency, as we know, is for many—perhaps most—defendants to regard this public defender as a part of the establishment which is arrayed against him."

So concerned was the old Defender Association about client suspicion of divided loyalty that it declined an offer of free office space in City Hall, and maintained its separate quarters in a private office building (Tr. 243-4). The effect upon client morale of an overt submission of the organization to 50% domination by the law enforcement group needs no imagination.

4. Constitutionally Mandated Defense Services Must Provide the Appearance as Well as the Reality of Independence.

An important function of providing defense counsel is to build confidence in the fairness of the judicial process. It is not merely that the outcome of a particular case may be skewed where there is a lawyer on one side and none on the other. It is that underprivileged groups in the community come to view courts and law with cynicism and hatred when trials seem one-sided, as where there is no defense counsel or an "official" defense counsel. *All* convictions become tainted in their eyes, even though the outcome of many individual cases would be found on close examination to be perfectly just.

The importance of avoiding the "appearance of evil" in the processes of justice is attested by cases like *Commonweath Coatings Corp.* v. *Continental Casualty Co.*, 393 U.S. 145 (1968); *Tumey* v. *Ohio*, 273 U.S. 510 (1927); and *Rapp* v. *Van Dusen*, 350 F.2d 806, 812 (3rd Cir. 1965) ("not only

actual impartiality [of a judge], but also the *appearance* of a detached impartiality").

5. The Court Below Explicitly and Erroneously Held That There Is No Conflict of Interest Between Prosecuting Authorities and the Accused.

At the heart of the holding of the Pennsylvania Supreme Court is the denial that "interests [of the Commissioner of Police and the City Solicitor, a prosecuting official, both appointed by the Mayor] are . . . antithetical to those of criminal defendants." App., *infra*, p. 8a. The proposition that prosecutor and criminal defendant have parallel or common interests is not only a palpable fiction; it is an extremely dangerous one. It is a theory appropriate to an authoritarian state like Russia.[17] On this theory of the congruence of interests of prosecutor and defendant, the Big Brother view of government, the Philadelphia plan here at issue could without constitutional obstacle provide for direct administration of the Defender Association by the District Attorney or the Police Commissioner himself. See also Mr. Chief Justice Burger's dissenting opinion (joined by Mr. Justice Rehnquist) in *Application of Fre Le Poole Griffiths for Admission to the Bar*, 93 S. Ct. 2581, 2560 (1973):

> "In some countries the legal system is so structured that all lawyers are literally agents of government and as such bound to place the interests of government over those of the client. That concept is so alien to our system with an independent bar that I find it difficult to

[17] The system of defense by state appointees in the U.S.S.R. was described by the witness, Sawyer (Tr. 526 et seq.). Compare the concerns expressed by a distinguished federal judge in Dimock, *The Public Defender: A Step Toward a Police State*, 42 A.B.A.J. 219 (1956).

see how nationals of such a country, inculcated with those ideas and at the same time unwilling to accept American citizenship, could be properly integrated to our system."

Listed below are subjects of obvious conflict of interest, as to which those who speak for the Mayor on the Board of Directors, as well as the non-tenured Chief Defender, will inevitably be responsive to the Mayor's inclinations:[18]

(i) limiting the Defender's staff in the face of constantly increasing case loads;

(ii) economizing on pre-trial preparation;

(iii) muting attacks upon the lawfulness of police practices;

(iv) limiting demands for expensive jury trials;

(v) limiting resort to defenses normally availed of by independent counsel to enhance the defense bargaining postion in plea negotiations;

(vi) a conservative policy in seeking review by appeal and collateral attack;

(vii) restraining challenges to the constitutionality of administration measures such as curfew ordinances and executive proclamations barring public assemblies;

(viii) restraining challenges by habeas corpus of inhuman conditions in the detention facilities, where improvement would involve expenditure of millions;

(ix) limiting the Defender's role as legislative advocate in criminal law, procedure, and corrections.

[18] Cf. Tr. 493 et seq.

Prosecution influence on these subjects will not be recorded in resolutions passed by the Board of Directors or instructions formally issued by the Mayor. Rather they will manifest themselves in a quiet word of counsel passed along to the non-tenured Chief Defender by the City Solicitor who sits on the Defender Board. Or in a complaint by the Police Commissioner to the Mayor that the defender attorneys are overly aggressive in challenging policemen's testimony in court—a complaint that the Mayor's administrative assistant quietly "bucks on" to the Defender.

Herman Pollock, former Chief Defender, a principal negotiator of the "partnership" arrangement, testified as follows at Tr. 592:

> . . . whether or not this organization continues as an independent organization is not going to depend on the City; it's going to depend on our own Board that's there now. *If they will continue to fight* to keep the Association independent, it will be independent, but if they're going to compromise all over the place then it may be our effectiveness may be diminished. No doubt about that.
>
> *If they can muster the necessary community support,* in my opinion, should the occasion arise when it is needed to protect the independence of the Defender and the staff, I think there will be no trouble in Philadelphia of doing it (emphasis supplied).

This is an outright admission that the situation was one fraught with peril of political interference against which the independent directors and other community agencies must "*continue to fight.*" It is a complete refutation of the holding by the Court below that there is no conflict of interest between the accused and his prosecutors. What City

Hall's attitude will be towards an aggressive defender operation is perfectly summed up in the public declaration by Philadelphia Police Commissioner (now Mayor) Rizzo that organizations that "fight the Police Department . . . won't get a penny." [19]

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Pennsylvania.

Respectfully submitted,

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[19] See footnote 4 in the dissenting opinion of Justice Roberts, pp. 7-8 above.